RECENT DEVELOPMENT

THE EXCLUSIONARY RULE AND THE DUELING LEGACIES OF *UTAH V. STRIEFF*: WHICH WILL BE SUPPRESSED?

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I. INTRODUCTION

The United States Supreme Court ruled on *Utah v. Strieff*[1] during the summer of 2016.[2] *Strieff* involves the Fourth Amendment, the admission of evidence, the exclusionary rule, and the attenuation doctrine.[3] The Supreme Court had not heard a case dealing with the exclusionary rule since 2011 when the Court heard *Davis v. United States*.[4] Prior to the *Strieff* decision, observers were in two camps: (1) it was likely the respondent would prevail if the Court maintained its traditional position on the exclusionary rule; or (2) it was uncertain what the outcome would be if the Court decided to further pare down the exclusionary rule's scope, but it would weigh in the State's favor.[5]

The future of the exclusionary rule was the "big conceptual question" leading up to the Supreme Court hearing the case.[6] Over the last decade, the Supreme Court has narrowed the exclusionary rule's application "only to those cases where the police misconduct was deliberate, reckless, or grossly negligent."[7] Ultimately, the Court decided to continue narrowing the scope of the exclusionary rule.[8]

1. Utah v. Strieff, 136 S. Ct. 2056 (2016).

2. *Id.* at 2059 ("We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest."). The opinion was written by Justice Clarence Thomas and joined, in majority, by Chief Justice John Roberts, Justice Anthony Kennedy, Justice Stephen Breyer, and Justice Samuel Alito. *Id.*

3. *See id.* (discussing briefly the issues of the case).

4. Davis v. United States, 131 S. Ct. 2419 (2011). In *Davis*, police arrested a driver for driving while intoxicated and a passenger for giving a false name pursuant to a routine traffic stop; upon searching the vehicle, police discovered the passenger had in his possession and illegal revolver. *Id.* at 2425. Although the search of the vehicle was initially consistent with the Fourth Amendment, the search was rendered unlawful while the case was on appeal by *Arizona v. Gant*. *Id.* at 2426 (citing Arizona v. Grant, 556 U.S. 332 (2009). The *Davis* court held the exclusionary rule was inapplicable because the arresting officer was neither negligent nor culpable so there would be no meaningful deterrent attained if the evidence was suppressed. *Id.* at 2428.

5. *See* Orin Kerr, *Argument Preview:* Utah v. Strieff *and the Future of the Exclusionary Rule*, SCOTUSBLOG (Feb. 3, 2016, 4:09 pm), http://www.scotusblog.com/2016/02/argument-preview-utah-v-strieff-and-the-future-of-the-exclusionary-rule/ (previewing the arguments leading up to the Court hearing the *Strieff* case).

6. *Id.*

7. Zack Gong, Comment, Utah v. Strieff *and the Future of the Exceptions to the Exclusionary Rule*, 11 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 291, 301 (2016). "*Strieff* 'fits' into the recent, more dominant trend by the Court to limit the exclusionary rule's impact and effects through the broadening of the individual exclusion exceptions." Christopher D. Totten, Utah v. Strieff*: The Continued Erosion of the Exclusionary Rule and Fourth Amendment Protections by the United States Supreme Court*, 58 CRIM. L. BULL. 1742, 1743 (2016) (footnote omitted). Because of the *Strieff* decision, "the attenuation exception appears to be appreciably expanded." *Id.*

8. *See Strieff*, 136 S. Ct. at 2059 (holding evidence seized incident to arrest is not subject to the

The case attained more media and public coverage than anticipated due to Justice Sonia Sotomayor's dissent. The case will be remembered for both further diminishing the exclusionary rule and for Justice Sotomayor's lambasting of the majority's opinion in a passionate plea to voice the voiceless.[9] This Recent Development discusses the facts and procedural history of the *Strieff* case, the issue presented, the majority's analysis, the dissenting opinions, how other jurisdictions have ruled on similar facts, and the case's potential future impact in a variety of areas.

II. FACTS AND PROCEDURAL HISTORY

It started with an anonymous tip as a caller phoned the local police drug-tip line and reported narcotics activity occurring at a specified residence.[10] Narcotics detective Douglas Fackrell investigated the anonymous tip, and for roughly a week conducted sporadic surveillance of the residence mentioned in the tip.[11] Officer Fackrell observed a number of visitors arriving at the house and leaving after only a few minutes which resulted in the officer's suspicion that the residence's occupants were dealing drugs.[12] Among the visitors observed leaving the house by Officer Fackrell was the respondent, Edward Strieff.[13] Mr. Strieff walked from the house to a nearby convenience store.[14] Officer Fackrell stopped Mr. Strieff while in the convenience store's parking lot.[15] Upon request, Mr. Strieff provided the officer with his state identification card, and thereafter the police dispatcher informed the officer that Mr. Strieff had a warrant out for his arrest due to a traffic violation.[16] Mr. Strieff was then arrested pursuant to

exclusionary rule when "discovery of [an] arrest warrant attenuate[s] the connection between the unlawful stop and the evidence seized"). Justice Sotomayor, in dissent, stated:

> This case allows the police to stop you on the street, demand your identification, and check it for outstanding traffic warrants—even if you are doing nothing wrong. If the officer discovers a warrant for a fine you forgot to pay, courts will now excuse his illegal stop and will admit into evidence anything he happens to find by searching you after arresting you on the warrant.

Id. at 2064 (Sotomayor, J., dissenting).

9. *See id.* at 2071 (Sotomayor, J., dissenting) ("[T]he countless people who are routinely targeted by police . . . are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.").

10. *Strieff*, 136 S. Ct. at 2059.

11. *Id.*

12. *Id.*

13. *Id.* at 2060.

14. *Id.*

15. *Id.*

16. *Id.*

that arrest warrant.[17] Upon conducting a search incident to arrest, Officer Fackrell found a small bag of methamphetamine as well as drug paraphernalia.[18] Strieff was charged with possession of methamphetamine and possession of drug paraphernalia.[19]

At the suppression hearing, the prosecution acknowledged Officer Fackrell did not have the requisite reasonable suspicion for the stop, rendering it unconstitutional.[20] Unsurprisingly, Strieff argued the evidence was inadmissible as "fruit of a poisonous tree"[21] considering the evidence "was derived from an unlawful investigatory stop."[22] The majority was not persuaded by Strieff's argument.[23] Instead, the Court agreed with the State's argument: "[T]he evidence should not be suppressed because the existence of a valid arrest warrant attenuated the connection between the unlawful stop and the discovery of the contraband."[24]

Strieff pled guilty, but reserved the right to appeal the court's denial of his suppression motion.[25] The ruling was affirmed by the Utah Court of Appeals,[26] but the ruling was reversed by the Utah Supreme Court because it found that every U.S. Supreme Court case establishing attenuation doctrine precedent "involv[ed] independent acts of criminal defendants," so the Utah Supreme Court held that to sever the causation chain from the unconstitutional conduct to the discovery of the incriminating evidence, there must be "a voluntary act of a defendant's free will."[27] The U.S.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* For a law enforcement officer to conduct a temporary investigative detainment, the officer must have reasonable suspicion that a crime was committed or is about to be committed. Terry v. Ohio, 392 U.S. 1, 30 (1968). Officer Fackrell saw the suspect leaving the house being watched, but there was no evidence Officer Fackrell saw the suspect entering the house or how long he was in the house, so he was unable to provide an articulable suspicion. *Strieff*, 136 S. Ct. at 2063. This is critical because it factors into the reasonableness of the officer's suspicion to stop the suspect. An officer cannot stop someone based merely off a hunch. *Terry*, 392 U.S. at 27.

21. The fruit of the poisonous tree doctrine states that evidence obtained as a result of unlawful police conduct is generally inadmissible at trial. Wong Sun v. United States, 371 U.S. 471, 484–86 (1963). Although discussing the independent-source doctrine, Justice Oliver Wendell Holmes's remark in *Silverthorne Lumber Co. v. United States* is apposite: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

22. *Strieff*, 136 S. Ct. at 2060.

23. *Id.* at 2064.

24. *Id.* at 2060.

25. *Id.*

26. State v. Strieff, 286 P.3d 317, 335 (Utah Ct. App. 2012).

27. State v. Strieff, 357 P.3d 532, 536, 544 (Utah 2015).

Supreme Court agreed to hear the case and granted certiorari.[28] In the end, the Court reversed the Utah Supreme Court's decision.[29]

III. ISSUE

The issue in this case was "whether th[e] attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest."[30] Justice Kagan provided a succinct description of the legalities leading to the issue:

> If a police officer stops a person on the street without reasonable suspicion, that seizure violates the Fourth Amendment. And if the officer pats down the unlawfully detained individual and finds drugs in his pocket, the State may not use the contraband as evidence in a criminal prosecution. That much is [undisputed].[31]

Therefore, according to Justice Kagan, the issue is boiled down to whether the constitutional prohibition on evidence being admitted at trial is suspended upon an officer discovering the existence of an arrest warrant after stopping someone but prior to discovering the contraband.[32]

IV. ANALYSIS

The Court began its analysis with the Fourth Amendment. The Fourth Amendment protects "against unreasonable searches and seizures."[33] There are two general remedies for Fourth Amendment violations. First, if a police officer acts unconstitutionally, the officer may be sued in civil court.[34] Second, and a much more common remedy for unconstitutional police action, is asking the presiding judge in the criminal case to apply the exclusionary rule.[35] The exclusionary rule is the rule that may "require[] trial courts to exclude unlawfully seized evidence in a criminal trial."[36] The

28. *Strieff*, 136 S. Ct. at 2060.

29. *Id.*

30. *Id.* at 2059.

31. *Id.* at 2071 (Kagan, J., dissenting).

32. *Id.*

33. U.S. CONST. amend. IV.

34. *Strieff*, 136 S. Ct. at 2061.

35. *See id.* (declaring "the principal judicial remedy to deter Fourth Amendment violations" is the exclusionary rule (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961))).

36. *Id.* (citing Mapp v. Ohio, 367 U.S. 643, 655 (1961)). "[T]he exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments . . . ." Mapp v. Ohio, 367 U.S. 643, 657 (1961).

exclusionary rule is meant to deter the police from violating the law in the course of their law enforcement duties.[37] Critically, the benefits of applying the exclusionary rule must outweigh the tremendous cost for the court to apply the rule.[38]

There are exceptions to the exclusionary rule. One exception—and the exception applied in *Strieff*—is the attenuation doctrine.[39] The exclusionary rule is inapplicable when the connection between the unconstitutional police conduct and the evidence found as a result of that conduct is "sufficiently attenuated to dissipate the taint."[40] Furthermore, "an intervening independent act of a free will" can attenuate the connection between the initial taint of the unconstitutional conduct and the evidence's discovery.[41] The Court employed the factors laid out in *Brown v. Illinois*[42] to test whether the connection between the unconstitutional conduct and the discovery of the evidence was sufficiently attenuated.[43] The *Brown* factors are (1) the "temporal proximity" between the unconstitutional conduct and the evidence found;[44] (2) "the presence of intervening circumstances";[45] and (3) "the purpose and flagrancy of the official misconduct."[46] The third factor, the presence of intervening circumstances, is particularly

Though essential to the two constitutional amendments, the "exclusionary rule is not a command of the Fourth Amendment but is a judicially created rule of evidence." *Id.* at 661 (Black, J., concurring) (quoting Wolf v. Colorado, 388 U.S. 25, 39–40 (1949) (Black, J., concurring)). The test to exclude evidence is not whether the evidence would have remained undiscovered but for the unlawful conduct of law enforcement, but instead whether the evidence was discovered by exploiting the unlawful conduct rather than by measures sufficiently distinguishable in order to be expelled of the initial taint. *Wong Sun*, 371 U.S. at 487–88.

37. *See* United States v. Leon, 468 U.S. 897, 909 (1984) (asserting the exclusionary rule applies only when it "'result[s] in appreciable deterrence'" of unconstitutional police conduct (quoting United States v. Janis, 428 U.S. 433, 454 (1976))). "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." Herring v. United States, 555 U.S. 135, 144 (2009).

38. *Strieff*, 136 S. Ct. at 2061 (quoting Hudson v. Michigan, 547 U.S. 586, 591 (2006)). "[L]etting guilty and possibly dangerous defendants go free" is the primary cost of applying the exclusionary rule. *Herring*, 555 U.S. at 141 (citing United States v. Leon, 468 U.S. 897, 907–08 (1984)).

39. *Strieff*, 136 S. Ct. at 2061. The attenuation doctrine is when evidence is admissible even though it was obtained illegally because the evidence being challenged has "become so attenuated as to dissipate the taint." Nardone v. United States, 308 U.S. 338, 341 (1939).

40. Segura v. United States, 468 U.S. 796, 815 (1984).

41. *Wong Sun*, 371 U.S. at 486.

42. Brown v. Illinois, 422 U.S. 590 (1975).

43. *Strieff*, 136 S. Ct. at 2061–62.

44. *Brown*, 422 U.S. at 603.

45. *Id.* at 603–04 (citing Johnson v. Louisiana, 406 U.S. 356, 365 (1972)).

46. *Id.* at 604 (citations omitted).

significant.[47]

Applying the factors, the Court favored Strieff under the temporal proximity factor because the contraband was discovered "only minutes after the illegal stop."[48] The State was strongly favored under the intervening circumstances factor because "the existence of a valid warrant favors finding that the connection between unlawful conduct and the discovery of evidence is 'sufficiently attenuated to dissipate the taint.'"[49] The State was also favored under the purpose and flagrancy factor because there was no evidence that the unlawful stop derived from "systemic or recurrent police misconduct."[50] Instead of there being a "system of recurrent police misconduct[,]" the Court determined the investigating officer, in an "isolated instance[,]" was "[at] most negligent" in his conduct considering the officer could not articulate how long Strieff was in the house under surveillance and because the officer should have asked Strieff for permission to speak with him.[51] The three factors, taken together, resulted in the Court's refusal to apply the exclusionary rule in this case.

V. DISSENTS

Two dissenting opinions were authored in *Strieff*—the first by Justice Sonia Sotomayor, with whom Justice Ruth Bader Ginsburg joined for the first three out of four parts,[52] and the second by Justice Elena Kagan, with whom Justice Ginsburg joined.[53] Although multiple dissenting opinions were written, it was Justice Sotomayor's dissent that garnered the most attention.[54] Justice Sotomayor criticized how the

47. *Id.* Like the Court in *Brown*, Justice Thomas reiterated in *Strieff* that the third factor of the *Brown* attenuation test was of particular significance when examining the issue. *Strieff*, 136 S. Ct. at 2062.

48. *Strieff*, 136 S. Ct. at 2062.

49. *Id.* (quoting Segura v. United States, 468 U.S. 796, 815 (1984)). The majority relied on *Segura* despite the fact that the exclusionary rule exception discussed in that case is the independent-source doctrine. Segura, 468 U.S. at 815. The majority reasoned that because the warrant was issued prior to the investigation with no connection to the stop whatsoever, Strieff's arrest was "independently compelled by the pre-existing warrant." *Strieff*, 136 S. Ct. at 2063. Without question, this factor was expansively construed in *Strieff*. Totten, *supra* note 7, at 1743.

50. *Strieff*, 136 S. Ct. at 2063.

51. *Id.* (referring to Officer Fackrell's errors as "good-faith mistakes"). "[I]n the wake of *Strieff*, it is somewhat hard to imagine examples of police misconduct that would be considered 'flagrant' under attenuation analysis." Totten, *supra* note 7, at 1744 (footnote omitted).

52. *Strieff*, 136 S. Ct. at 2064 (Sotomayor, J., dissenting).

53. *Id.* at 2071 (Kagan, J., dissenting).

54. *See* Ronald Tyler, Utah v. Strieff*: A Bad Decision on Policing with a Gripping Dissent by Justice Sotomayor*, STAN. L. SCH.: LEGAL AGGREGATE BLOG (July 5, 2016), https://law.stanford.edu/2016/07/05/utah-v-strieff-a-bad-decision-on-policing-with-a-gripping-dissent-by-justice-sotomayor/ ("I am especially impressed by Justice Sotomayor. She conducts a suitably careful and intelligent

majority applied the *Brown* factors to the case, particularly the majority's dependence on the independent-source doctrine precedent to tilt the intervening circumstances factor towards the State.[55] Justice Sotomayor also disagreed with the majority's characterization of Officer Fackrell's conduct as being nothing more than "good-faith mistakes" and "negligent[,]" stating "the Fourth Amendment does not tolerate an officer's unreasonable searches and seizures just because he did not know any better."[56] Most astonishing to Justice Sotomayor was the majority's claim that the officer's conduct merely represented an isolated incident.[57] With measured restraint, Justice Sotomayor states unequivocally, "nothing about this case is isolated."[58] Justice Sotomayor cites numerous examples of how one can be issued an outstanding arrest warrant, and how common arrest warrants are.[59]The last section of Justice Sotomayor's dissent was not joined by another Justice, but it was the section that garnered the most media and public attention.[60] Justice Sotomayor argued that there would

analysis, but does so in a voice that speaks . . . to the ordinary people who are most impacted by the Court's Fourth Amendment jurisprudence."); Shaun King, *Justice Sonia Sotomayor's Powerful Supreme Court Dissenting Opinion Gives Voice to People of Color Who've Been Stopped, Harassed by Police*, N.Y. DAILY NEWS (June 20, 2016, 3:26 PM), http://www.nydailynews.com/news/national/king-sotomayor-powerful-opinion-voice-people-color-article-1.2680800 ("In what may be the most powerful Supreme Court opinion ever written about racial profiling and police harassment, Justice Sonia Sotomayor gave voice to what hundreds of thousands of people of color have experienced when being stopped and harassed by police."); Mark Joseph Stern, *Read Sonia Sotomayor's Atomic Bomb of a Dissent Slamming Racial Profiling and Mass Imprisonment*, SLATE (June 20, 2016, 11:34 AM), http://www.slate.com/blogs/the_slatest/2016/06/20/sonia_sotomayor_dissent_in_utah_v_strieff_takes_on_police_misconduct.html (referring to Justice Sotomayor's dissent as "stunning," "jaw-dropping," and a "bright spot," with her "bravest moment" coming when she writes for herself and draws from her personal experiences in the last part of the dissent).

55. Strieff, 136 S. Ct. at 2067 (Sotomayor, J., dissenting). Justice Sotomayor lamented the majority's characterization of the case's facts being similar to those in *Segura*, especially because in *Strieff* "the officer's illegal conduct in stopping Strieff was essential to his discovery of an arrest warrant." *Id.* In *Segura*, Drug Enforcement Administration agents believed the occupants of the apartment under surveillance were trafficking cocaine. *Segura*, 468 U.S. at 799–800. The agents entered the apartment while still waiting for the search warrant, which was issued the next day, and arrested the apartment's occupants. *Id.* at 800–01. While in the apartment, the agents conducted a security sweep and discovered drug paraphernalia. *Id.* Although the entry may have been unlawful, the Supreme Court held the evidence discovered was admissible because the warrant was supported by information that was "wholly unconnected with the entry." *Id.* at 814.

56. *Strieff*, 136 S. Ct. at 2067–68 (Sotomayor, J., dissenting).

57. *Id.* at 2068.

58. *Id.*

59. The most striking statistic presented by Justice Sotomayor in her dissent was that 16,000 of the 21,000 people living in Ferguson, Missouri "had outstanding warrants against them." *Id.*

60. "Justice Sotomayor reserved her most personal reflection for a part of her dissent in which she wrote only for herself, setting out in detail the dangers and indignities that often accompany police stops." Adam Liptak, *Supreme Court Says Police May Use Evidence Found After Illegal Stops*, N.Y. TIMES

be severe consequences resulting from unlawful stops.[61] She argued that unlawful stops will dramatically rise, which will result in more arrests.[62] Further, Justice Sotomayor was concerned about the people targeted for suspicionless stops: "[I]t is no secret that people of color are disproportionate victims of this type of scrutiny."[63] Justice Sotomayor asserts that "[b]y legitimizing the conduct that produces this double consciousness, this case tells everyone . . . an officer can verify your legal status at any time" and "that your body is subject to invasion while courts excuse the violation of your rights," noting how one can infer "that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged."[64] Justice Kagan also authored a dissenting opinion, which was joined by Justice Ginsburg.[65] Justice Kagan argued that the "added wrinkle" of the police discovering that the detainee had an outstanding arrest warrant against him after the stop but prior to the discovery of any contraband "makes no difference under the Constitution."[66] She warns, "[t]he majority's misapplication of *Brown*'s three-part inquiry creates unfortunate incentives for the police—indeed, practically invites them to do what [Officer] Fackrell did here."[67]

VI. OTHER JURISDICTIONS

Just about every jurisdiction that has dealt with this issue has found it appropriate to apply the *Brown* factors.[68] Though the three factors are used, they are applied to varying degrees.[69] Many courts have softened the significance of the temporal proximity factor, especially with regards to

(June 20, 2016), http://www.nytimes.com/2016/06/21/us/supreme-court-says-police-may-use-evidence-found-after-illegal-stops.html.

61. *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J., dissenting).

62. "This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact." *Id.*

63. *Id.* at 2070 (citing MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 95–136 (2010)).

64. *Id.* at 2070–71. The "carceral state" is where millions of people are either in prison or are "detained" through monitoring while on probation or parole. *See* MARIE GOTTSCHALK, THE PRISON AND THE GALLOWS: THE POLITICS OF MASS INCARCERATION IN AMERICA 1 (2006) (describing the prison system in the United States and noting how nearly seven million people are either incarcerated or under some other type of correctional supervision).

65. *Strieff*, 136 S. Ct. at 2071 (Kagan, J., dissenting).

66. *Id.*

67. *Id.* at 2073.

68. State v. Mazuca, 375 S.W.3d 294, 303–04 (Tex. Crim. App. 2012) (citations omitted).

69. *See id.* at 304 (describing how "many courts have downplayed [temporal proximity's] significance" while noting that "[o]ther courts have tended . . . to briefly mention all three of the *Brown* factors while highlighting the intervening circumstance factor").

when an arrest warrant is discovered between an illegal stop and the unearthing of contraband.[70] Some courts have underscored the intervening circumstances factor "as practically determinative of attenuation."[71] Nevertheless, the trend for courts now seems to be preference for the purpose and flagrancy factor while "downplay[ing] both the temporal proximity factor and, to a lesser extent, the intervening circumstance factor . . . ."[72]

VII. FUTURE IMPACT

A. *Rise of Suspicionless Stops and the Fall of Deterrence*

The immediate concern was whether the *Strieff* decision would provide an opportunity for police to purposely conduct unconstitutional stops in the hopes that the person stopped has an outstanding arrest warrant.[73] There

70. *Id.*; *see* United States v. Johnson, 383 F.3d 538, 545 n.7 (7th Cir. 2004) ("[W]hen a lawful arrest due to an outstanding warrant is the intervening circumstance, the temporal component is less relevant than in situations where the police exploit an illegal detention to create a predictable response (*e.g.*, confession or consent to search).") (citing United States v. Green 111 F.3d 515, 522 (7th Cir. 1997))); United States v. Green, 111 F.3d 515, 521 (7th Cir. 1997) (providing the temporal proximity factor is not as relevant when involving the discovery of an outstanding arrest warrant); People v. Hillyard, 589 P.2d 939, 940–41 (Colo. 1979) (en banc) (providing an "invalid stop does not *per se* require suppression of evidence seized thereafter[,]" but "each case must be decided on its facts taking into consideration such factors as . . . the degree of police misconduct and any relevant intervening circumstances"); State v. Martin, 179 P.3d 457, 463 (Kan. 2008) (noting the temporal proximity factor in *Brown* is not dispositive on the case because of the interceding arrest warrant as well as the absence of purposefulness of the unconstitutional police conduct); State v. Hill, 725 So.2d 1282, 1284 (La. 1998) (agreeing with other courts that the temporal proximity factor is not dispositive).

71. *Mazuca*, 346 S.W.3d at 304; *see* Jacobs v. State, 128 P.3d 1085, 1089 (Okla. Crim. App. 2006) (finding the intervening circumstance of discovering an arrest warrant dissipates the taint of the unconstitutional conduct that led to its discovery); State v. Page, 103 P.3d 454, 459 (Idaho 2004) (finding "the taint of an unlawful seizure" was dissipated when the officer found out about the outstanding arrest warrant); State v. Thompson, 438 N.W.2d 131, 137 (Neb. 1989) (finding the outstanding arrest warrant's discovery was determinative to absolve the taint of the illegal search).

72. *Mazuca*, 346 S.W.3d at 304; *see* United States v. Faulkner, 636 F.3d 1009, 1015–17 (8th Cir. 2011) (applying the three factor test and stating the temporal proximity factor is less relevant while the intervening circumstance factor is "more compelling"); United States v. Simpson, 439 F.3d 490, 495–97 (8th Cir. 2006) ("Here, the intervening circumstance is an arrest warrant, not a voluntary act . . . . Therefore, our review need not focus on the [temporal proximity] factor."); People v. Brendlin, 195 P.3d 1074, 1079–81 (Cal. 2008) (relying on the *Brown* factors and holding the temporal proximity and intervening circumstance factors are less relevant in cases of outstanding warrants); State v. Frierson, 926 So.2d 1139, 1144–45 (Fla. 2006) (finding the temporal proximity factor non-dispositive). *But see* United States v. Gross, 624 F.3d 309, 322 (6th Cir. 2010), *amended on other grounds*, 662 F.3d 393 (6th Cir. 2011) (finding even though the purpose and flagrancy factor did "not weigh heavily in the attenuation determination[,]" the taint of the unconstitutional detention was not dissipated as a result of the arrest warrant being discovered).

73. The majority rejected Strieff's argument that "police will engage in dragnet searches" without

is worry that the *Strieff* decision may have left the wrong impression for police officers concerning the limits of *Terry* stops: "In no way . . . did the court sanction such unconstitutional stops as a means for officers to run random name checks for warrants."[74] Doing so would indicate "a purposeful and systemic plan" that would ultimately lead to evidence suppression and civil liability for those officers and for the agency.[75] Though it was not the intent of the majority to allow for such police conduct, "perhaps, inadvertently, [the *Strieff* decision] cleared the way for continued unconstitutional stops."[76]

As stated by Justice Sotomayor, limiting the exclusionary rule to this extent could create a group of second-class citizens.[77] The concern for many is that people of color are disproportionately stopped to conduct warrant checks.[78] Concern resulting from the decision in *Strieff* heightened as a result of the decision's timing. The decision came down during a time of great tension between police and some communities—especially those comprised of people of color.[79] In instances similar to those in *Strieff*, there is no effectual deterrent for unconstitutional police behavior without the exclusionary rule.[80] In the contemporary cost-benefit rationale dominating the exclusionary rule analysis, the "cost" has been overstated. The Court has said, "letting guilty and possibly dangerous defendants go free" is the

the deterrence of the exclusionary rule. *Strieff*, 136 S. Ct. at 2064. Justice Kagan warned that the majority incentivizes unconstitutional police behavior and essentially invites police to act as Fackrell did. *Id.* at 2073 (Kagan, J., dissenting). However, as previously noted, Fackrell's conduct was characterized by the majority as "[at] most negligent." *Id.* at 2063. Even so, commentators say police being motivated to conduct suspicionless, unconstitutional stops as a result of the *Strieff* decision is not just a potential consequence but "perhaps [a] likely consequence." Totten, *supra* note 7, at 1742–43.

74. Terrence P. Dwyer, *The* Utah v. Strieff *Decision and the Limits of the Exclusionary Rule*, POLICEONE.COM (July 29, 2016), https://www.policeone.com/investigations/articles/204533006-The-Utah-v-Strieff-decision-and-the-limits-of-the-exclusionary-rule/.

75. *Id.*

76. Katherine A. Macfarlane, *Predicting* Utah v. Streiff*'s Civil Rights Impact*, 126 YALE L.J. F. 139, 148 (2016).

77. *Strieff*, 136 S. Ct. at 2069 (Sotomayor, J. dissenting). Justice Sotomayor catalogues the power the Supreme Court has provided law enforcement officers: "This Court has given officers an array of instruments to probe and examine you. When we condone officers' use of these devices without adequate cause, we give them reason to target pedestrians in an arbitrary manner. We also risk treating members of our communities as second-class citizens." *Id.*

78. *See id.* at 2070 ("[I]t is no secret that people of color are disproportionate victims of this type of scrutiny." (citing ALEXANDER, *supra* note 63, at 95–136). At least one activist and journalist noted that Justice Sotomayor's dissent "may be the most powerful Supreme Court opinion ever written about racial profiling and police harassment." King, *supra* note 54.

79. Tyler, *supra* note 54.

80. *See* Macfarlane, *supra* note 76, at 142 ("Before *Strieff*, an officer about to stop someone without reasonable suspicion might have paused to consider the risk of rendering relevant evidence inadmissible. After *Strieff*, that same officer has no reason to hesitate.").

primary cost of applying the exclusionary rule.[81] Nevertheless, the vast majority of people with outstanding arrest warrants are not dangerous.[82]

B. *Hindrance to Section 1983 Plaintiffs*

Additionally, the ability for civil rights plaintiffs to recover damages resulting from unconstitutional stops under 42 U.S.C. § 1983 is affected as a result of the *Strieff* decision.[83] Section 1983 allows causes of action for people against those who have deprived the other's constitutional or legal rights, privileges, or immunities.[84] The majority in *Strieff* assumes section 1983 will operate to adequately deter future unconstitutional police behavior when a court does not apply the exclusionary rule.[85] This may not be the case, however, because if the exclusionary rule does not apply, a defendant is more likely to see that conviction is inevitable; consequently the defendant is more likely to enter a guilty plea, even to lesser charges.[86]

The problem is that probable cause for the arrest can be established if the accused enters a guilty plea—even if the plea is to lesser charges—and is therefore convicted, which means the person entering the guilty plea would find it increasingly more difficult to bring a successful false arrest claim pursuant to section 1983 than it is already.[87] Such claims, when successful, can produce compensatory damages worth up to hundreds of thousands of dollars.[88] As a result, *Strieff* may end up leaving mere nominal damages as the only practical remedy available, if anything.[89] The ruling in *Strieff* will likely be a catalyst for a rise in the number of guilty pleas and, consequently,

81. Herring v. United States, 555 U.S. 135, 141 (2009).

82. The majority of arrest warrants are for traffic violations, rather than for violent or other serious crimes. *See e.g.*, State v. Frierson, 926 So.2d 1139, 1141 (Fla. 2006) (providing an arrest warrant was issued because the defendant failed to appear in court for another proceeding).

83. *See* Macfarlane, *supra* note 76, at 147 (examining the effect *Strieff* will have on civil rights plaintiffs and concluding "[t]he victims of unconstitutional stops will be left without any meaningful remedy in their criminal trials *or* as civil rights plaintiffs").

84. 42 U.S.C. § 1983 (2012).

85. *See Strieff*, 136 S. Ct. at 2064 (rejecting Strieff's argument that "police will engage in dragnet searches if the exclusionary rule is not applied" because "[s]uch wanton conduct would expose police to civil liability"); *see also* Macfarlane, *supra* note 76, at 141 (linking the Court's presumption in *Strieff* with the Court's same presumption in *Hudson*).

86. Macfarlane, *supra* note 76, at 143.

87. *See* Johnson v. Pugh, No. 11-CV-385 (RRM) (MDG), 2013 WL 3013661, at *2 (E.D.N.Y. June 18, 2013) (explaining how a plaintiff's guilty plea to an offense and subsequent conviction establishes probable cause and precludes a plaintiff from being able to being a false arrest claim).

88. Alla v. Verkay, 979 F. Supp. 2d 349, 372 (E.D.N.Y. 2013) (affirming a $360,000 award in compensatory damages pursuant to a false arrest claim). The police held the plaintiff for nineteen hours. *Id.* The plaintiff was awarded the damages because he "experienced sleeplessness, anxiety, and suicidal ideation as a result of his arrest" even though he was not physically assaulted. *Id.*

89. Macfarlane, *supra* note 76, at 143–44.

a drop in successful false arrest claims pursuant to section 1983. Accordingly, there will likely be a rise in the number of convictions due to more incriminating evidence now likely being admissible.[90]

C. *Effect on Legal Services*

Under similar circumstances, it is difficult to imagine the deterrence of unconstitutional police behavior being successful if section 1983 claims are going to be reduced to little more than mere nominal damages.[91] Moreover, if false arrest claims under similar conditions are essentially limited to nominal damages, there is great risk that lawyers are going to be less inclined to agree to represent such clients.[92] Resultantly, only lawyers willing to take on these cases on a pro bono basis in hopes of advancing social justice may be readily available to represent such clients.[93]

D. *Effect on Future Cases*

Future cases will undoubtedly be affected by the *Strieff* decision. Although the effects of the *Strieff* decision are uncertain, it is clear the new rule allows a dangerous space for law enforcement to operate unconstitutionally without threat of repercussion. As such, the Court's interpretation of the *Brown* factors may lead to even further erosion of the exclusionary rule.[94] Perhaps the *Brown* factors should be replaced with "a broader factual context that recognizes baseline policies already in effect—including Supreme Court precedent" because the *Brown* factors no longer "fit the contemporary [cost-benefit] rationale behind the exclusionary rule."[95] The *Strieff* decision may have brought to life what *United States v. Gross*[96] warned about: the rule as currently analyzed by the Court may "create[] a new form of police investigation, whereby an officer patrolling a high crime area may, without consequence, illegally stop a group of residents

90. *Id.* at 143

91. *Id.* at 144–45; *cf.* Hudson, 547 U.S. at 598 (displaying skepticism as to whether civil law damages act as a police deterrent at all).

92. *See* Macfarlane, *supra* note 76, at 145–47 (2016) (explaining why such cases will be unattractive to lawyers).

93. *See, e.g.*, Tyler, *supra* note 54 (describing being energized by both the dissents in the case).

94. *See* Merry C. Johnson, Comment, *Discovering Arrest Warrants During Illegal Traffic Stops: The Lower Courts' Wrong Turn in the Exclusionary Rule Attenuation Analysis*, 85 MISS. L.J. 225, 260 (2016) ("The failure to correctly apply *Brown* leads to grave public policy concerns and threatens to erode Fourth Amendment protections.").

95. *Utah v. Strieff—Leading Cases*, 130 HARV. L. REV. 337, 342 (2016) [hereinafter *Utah v. Strieff—Leading Cases*].

96. United States v. Gross, 624 F.3d 309 (6th Cir. 2010), *amended on other grounds*, 662 F.3d 393 (6th Cir. 2011).

where he has a 'police hunch' that the residents may . . . have outstanding warrants."[97]

VIII. CONCLUSION

The ruling in *Strieff* was not a surprise to many considering that the Court had been continuing in the direction of more exclusionary rule erosion over the last decade.[98] With the Court holding that "the evidence the officer seized as part of the search incident to arrest [was] admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest," the attenuation doctrine is strengthened.[99] Many think that the *Strieff* ruling gutted the best deterrent for unconstitutional police behavior and is going to allow for more suspicionless stops in hopes of detaining someone who has an outstanding arrest warrant.[100] Meanwhile, others feel such conduct would violate the systemic or recurrent action prohibition that triggers the exclusionary rule.[101]

Beyond the concern of a rise in suspicionless stops by undeterred police officers, the *Strieff* decision may also hinder civil rights plaintiffs in the type and amount of damages they can be awarded, discourage and decrease the number of lawyers willing to take on such plaintiffs, and determine how future cases will be ruled given how the *Brown* factors are contemporaneously applied. It is likely people are already being arrested because of unlawful stops followed by the discovery of an arrest warrant, and any evidence found during a search incident to arrest pursuant to that arrest warrant could be used against them. The *Strieff* decision will have one of two legacies: either this case will lead to even greater devaluation of the exclusionary rule, or the passionate plea in Justice Sotomayor's dissent will inspire lawyers, judges, future lawyers, and future judges to restore much of

97. *Id.* at 320–21.

98. Gong, *supra* note 7, at 301.

99. *Strieff*, 136 S. Ct. at 2059.

100. *See Utah v. Strieff—Leading Cases*, *supra* note 95, at 346 ("For five Justices, the boost to the efficacy of suspicionless stops must have been more societally valuable than diminished Fourth Amendment protection, increased incentive for police to abuse their discretion, and heightened justifiable distrust of police in minority and poor neighborhoods."); Tyler, *supra* note 54 (agreeing with Justice Kagan's dissent in which she predicts that the decision will create "unfortunate incentives" for stops absent reasonable suspicion).

101. *See* Dwyer, *supra* note 74 ("In no way . . . did the [C]ourt sanction such unconstitutional stops as a means for officers to run random name checks for warrants. Such a purposeful and systemic plan as that would not only lead to suppression of evidence but civil liability for the officer(s) involved and the agency.").

what has been lost of the exclusionary rule.[102]

102. Tyler, *supra* note 54 ("[R]eflecting on *Utah v. Strieff*, rather than feeling completely demoralized by the wrongly-decided majority opinion, I find myself energized by both dissents and especially uplifted by Justice Sotomayor's appeal to our shared humanity.").